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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 305.

UNITED STATES OF AMERICA, *Appellant*,

vs.

FRUIT GROWERS EXPRESS COMPANY, *a Corporation*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF.

FOR THE FRUIT GROWERS EXPRESS COMPANY, APPELLEE.

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November, 1928.

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FOR THE FRUIT GROWERS EXPRESS COMPANY, APPELLEE.

THE CASE.

A motion to quash the indictment against appellee was sustained in the court below, and the case is here on the appeal of the Government.

Appellee, a non-carrier corporation under contract with the Pennsylvania Railroad to ice certain cars, "for and on behalf" of the Railroad, is alleged to have made incorrect written reports to the Railroad of the quantities of ice applied and that based thereon the Railroad made incorrect freight bills for the icing.

The indictment is for a violation of Section 20(7) of the Interstate Commerce Act relating to the records of common carriers, but it is not contended by the Government that appellee is a common carrier. (Gov. Br. 11.)

The indictment contains 75 counts, but the last 10 counts are abandoned (Gov. Br. 6), and the Government now presses for a decision:

Counts 1-50 inclusive which, referring to the ice reports made by appellee, charge appellee with making false entries in records "kept by a carrier," and

Counts 51-65 inclusive which, referring to "freight bills" prepared and rendered, not by appellee, but by the Pennsylvania Railroad, an interstate common carrier, not indicted, and "innocent" (Gov. Br. 2), charge appellee with making or causing to be made false entries in records "kept by a carrier."

As to the first class of offenses, Counts 1-50 inclusive, the indictment alleges appellee prepared and furnished the ice reports to the Railroad in accordance with its contract so to do, and that the Railroad "received and kept and accepted" them, and the contention of the Government is that because the Railroad retained possession of, or kept in its custody, the said ice reports,

in accordance with the regulations of the Interstate Commerce Commission, the said ice reports were records "kept by a carrier" within the meaning of the statute.

As to the second class of offenses, Counts 51-65 inclusive, it is not alleged that appellee either prepared, or had any control over the preparation of, the "freight bills," nor is it alleged that the Railroad in preparing and rendering them, based upon appellee's ice reports, "wilfully" made false entries therein. The actual "wilful making" of false entries by anyone in the "freight bills," so as to constitute an offense under the statute, is not alleged. No collusion between appellee and the Railroad to make false entries in "freight bills" is alleged. The Government admits the weakness of its contention in regard to these counts (Gov. Br. 11, 26).

THE QUESTION.

The broad question presented is whether or not a non-carrier corporation can be indicted either as a principal or as an abettor, under the provisions of the Act to Regulate Interstate Commerce here involved, which relate solely to the duties and obligations of common carriers engaged in interstate commerce, where it appears that the acts complained of were committed by said non-carrier corporation in the performance of a contract with an interstate carrier and not as an employe thereof.

Incidental to the broad question submitted, the Government's Brief presents the further question of the construction of Section 20(7) of the Interstate Commerce Act, particularly as to the meaning, or sense, in which the word "kept" is there used.

I.

THE AVERMENTS OF FACT.

The essential averred facts in the indictment covering both classes of offenses are the same, and may be summarized as follows:

(a). The Pennsylvania Railroad Company is a common carrier corporation subject to the provisions of the Interstate Commerce Act and Acts amendatory thereof;

(b). The said Railroad Company duly filed with the Interstate Commerce Commission published schedules and tariffs of refrigeration rates and charges for perishable commodities for transit over its lines;

(c). The terms of the refrigeration rates and charges provided that the bunkers of cars containing perishable commodities would be inspected every day from time of arrival to time consignees started to unload the same, and that whenever ice was required in said bunkers sufficient additional ice would be furnished to fill said bunkers, at and for a given price;

(d). The terms and conditions of the refrigerator rates provided that the service was exclusive of and in addition to the lawful rates for transportation;

(e). The appellee is a Delaware corporation, engaged, among other things, in the business of icing and re-icing refrigerator railroad cars;

(f). The appellee was acting at the time of the acts complained of under a written contract with The Pennsylvania Railroad Company, by the terms of which appellee covenanted to inspect and ice and re-ice refrigerator cars for and on behalf of said Railroad

Company as and when said cars were received over its lines in the City of Pittsburgh, Pennsylvania;

(g). The contract with said Railroad Company required that the appellee furnish to the Railroad a "report in writing" of the amount of ice placed in said refrigerator cars, and said reports, purporting to show the amount of ice placed in each car, were furnished to said Railroad Company by the appellee;

(h). The reports provided for as aforesaid were received and accepted by said Railroad Company "as true and correct reports" of the amount of ice placed in each car, and said reports were the only records from which said Railroad Company could make up its accounts and prepare and render bills to the consignees for the icing service rendered;

(i). The reports furnished as aforesaid to said Railroad Company by the appellee were allegedly false in the specific instances set forth in the several counts of the indictment.

See Count 1, Paragraphs 1 to 4 inc., R., pages 1 and 2.

The foregoing averments of fact form the basis in the first fifty counts of the indictment for the charge that the appellee did wilfully make and cause to be made a false entry "in a record kept by a common carrier subject to the Act to regulate Commerce;" and in the counts fifty-one to sixty-five inc., for the charge that the appellee "did wilfully make and cause to be made a false entry in a record kept by a common carrier subject to said Act to regulate Commerce * * *," that is, "in a certain written freight bill kept by said Railroad Company."

See Count 1, Paragraph 5, R., page 2; and Count 51, Paragraph 2, R., page 43.

The foregoing are the essentials of the facts and charges contained in the indictment under consideration here, but before leaving them we respectfully desire the Court to notice particularly with respect thereto:

(a). That said Railroad Company carrier is *not* indicted;

(b). That said Railroad Company carrier received and accepted said reports "as true and correct reports of the amount of ice placed in said bunkers of said cars" (Paragraph 4, R., page 2); and

(c). That appellee was *not* an *employe* of said Railroad Company carrier, but was a corporation engaged, among other things, in icing and re-icing cars *under contract for said Railroad Company* (Paragraph 3, R., page 2).

II.

LAW.

The syllabus of the indictment (R., page 111) cites as the law upon which said indictment is based the following sections of the Interstate Commerce Act:

> "Section 10 (1). That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter or thing in this Act re-

quired to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: Provided, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

Section 20, Paragraph 7:

"Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term of

not less than one year nor more than three years, or both such fine and imprisonment: Provided, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved."

And Criminal Code, Section 332:

"Principals defined." "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a Principal."

III.

ARGUMENT.

1. The several assignments of error really raise but a single question, namely, can a non-carrier corporation be indicted under the provisions of the Act to regulate Interstate Commerce here involved, either as a principal or an abettor, without an allegation of its having been guilty of collusion with a carrier that is subject to the provisions of that Act? We contend that no such indictment can be sustained, because, under the provisions of either Section 20, Paragraph 7, or Section 10 (1), those who are subject thereto are restricted to *individuals* who bear the specific relationships to the carriers designated in the Act; and that the appellee bears no such relationship.

2. We submit that in order to arrive at the intent and purpose of the legislation, and to find those to whom it applies, Section 10 (1) and Section 20, Paragraph 7, must be construed together.

Section 10 (1) sets forth the intent and purpose of the Act to regulate Commerce where its provisions are to be applied to "corporations" acting as interstate carriers, and specifies the individuals who shall be held responsible for any breach thereof. And with respect to the latter, said section provides that the individuals comprehended therein are "any director or officer of such corporation, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who, alone, or with any other corporation, * * * shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, * * * or who shall aid or abet" in the doing of anything prohibited by the Act.

See Section 10 (1), ante, page 6.

And if we apply the persons designated by the section just quoted from to the provisions of Section 20, Paragraph 7, it would seem to follow that where a common carrier *corporation* is involved, the words "Any person" at the beginning of the latter section must mean "any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation." And that where a breach of the Act on the part of a corporation occurs, the corporation is not subject to indictment, but some one or more of its servants coming within the class designated above must be indicted. This would seem to be clear not only from the context of the Act but upon authority.

In *In Re Peasley*, 44 Fed. 271, the Court says with respect to the foregoing Act that "corporations acting as common carriers between states are not liable criminally for violations of the Interstate Commerce

Act nor are they exposed to its penalties and forfeitures."

And in *Toledo, etc. Railway Company vs. Pennsylvania Company*, 54 Fed. 730, 736, Judge Taft says:

> "By the foregoing section (Section 10) a common carrier which is not a corporation is made liable criminally for violations of the Interstate Commerce Law. But when the carrier is a corporation and violates the law, not the corporation, but its officers, agents and persons acting for or employed by it, who wilfully do the wrongful work, are made liable."

The words "any person" in a statute "cannot be taken to mean any person in the United States, but must be taken to refer to the class with which the statute undertakes to deal." *United States v. Moy*, 241 U. S. 394, 402. The statute now under consideration undertakes to deal with interstate common carriers and with "any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed" thereby. There are no words in the indictment which bring appellee within the meaning of the words "any person" as used in this statute.

If, therefore, it is the guilty *individual* and not the *employer corporation* who is held responsible for the integrity of the records prescribed by the Act, it is difficult to see how an independent, non-carrier corporation can be held criminally liable for a breach of the Act without averment in the indictment of facts that will show that said non-carrier corporation was within the provisions of said Act or that it had been guilty of collusion with some employee of an interstate carrier in wilfully committing the breach complained of.

It is, therefore, important to consider, first, what is

meant by the provisions of Section 20, Paragraph 7, with respect to the records therein provided for.

3. We submit that in the construction of a statute that is highly penal, as is the one under discussion (*Oregon-Washington R. & Nav. Co. vs. U. S.*, 222 Federal Rep., 887, C. C. A., Ninth Circuit; *United States vs. Northern Pacific Railway Co.*, 242 U. S., 190; *United States vs. Tippit*, 298 Fed. 500), words must be given their usual, ordinary meaning, and that the words used in the paragraph under consideration can only be construed to mean the "accounts" *required by law* to be "kept by the carrier"—*i. e.*, in the sense of making entries therein, as distinguished from the data from which they are made. Such construction is the only one that can logically be given when the records referred to are read in the light of other provisions of the Act to regulate Commerce. For example, under the Twentieth Section of the Act to regulate Commerce, the Interstate Commerce Commission is authorized to require annual reports from interstate carriers, which shall contain such information as the Commission may desire, and among other data specifically required are "the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business;" and the Commission may prescribe the time for filing such reports, and "as near as may be, a uniform system of accounts, and the manner in which said accounts shall be kept." And it is therein further provided that "the Commission shall, at all times, have access to all accounts, records, and memoranda *kept* by the carriers subject to this Act, *and it shall be unlawful* for such carriers to *keep any other accounts, records or memoranda* than those prescribed by the Commission" (italics are ours).

And this Court has sustained the constitutionality of the foregoing provisions, and shown the necessity for keeping uniform accounts under rules prescribed by the Commission, in *Interstate Commerce Commission vs. Goodrich Transit Co.*, 224 U. S., 194. In the latter case this Court says, at page 211:

> "The necessity of keeping such accounts has been developed in the reports of the Commission and has been the subject of great consideration. It caused the employment of those skilled in such matters, and has resulted in the adoption of a general form of accounting which will enable the Commission to examine into the affairs of the corporation, with a view to discharging its duties of regulation concerning them."

And again, at page 216:

> "Bookkeeping, it is said, is not interstate commerce. True, it is not. But bookkeeping may and ought to show how a business which, in part at least, is interstate commerce, is carried on, in order that the Commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority."

And in *United States vs. L. & N. R. R. Co.*, 236 U. S., 318, the Commission undertook to compel a carrier to produce "its correspondence," lists of passes, etc. And upon refusal upon the part of the carrier to furnish the information demanded, the question as to the Commission's rights, and the proper construction of the Interstate Commerce Act, reached this Court.

This Court, after reviewing the history of Section 20 of the Act, and showing that the present requirements of the Act were inserted at the Commission's own request, at page 334, said:

> "If we apply the rule of construction,—*noscitur a sociis*,—*we find that all the provisions of the act as to the inspection of accounts have relation to such as are kept in the system of bookkeeping to be prescribed by the Commission.* It would be a great stretch of the meaning of the term as here used, to make 'memoranda' include correspondence. The 'records' of a corporation import the transcript of its charter and by-laws, the minutes of its meetings—the books containing the accounts of its official doings and the written evidence of its contracts and business transactions. Certainly it was not intended that the Commission should prescribe the forms of correspondence, although it was given the power to prescribe the forms of all accounts, records, and memoranda subject to the provisions of the act." (Italics are ours.)

And again, at page 336:

> "The primary object to be accomplished was to establish a uniform system of accounting and bookkeeping, and to have an inspection thereof. If it intended to permit the Commission to authorize examiners to seize and examine all correspondence of every nature, Congress would have used language adequate to that purpose. A sweeping provision of that nature, attended with such consequences, would not be likely to have been enacted without probable exceptions as to some lines of correspondence required to be kept open and subject to inspection upon demand of the agents of the government."

We submit, therefore, that the foregoing cases demonstrate the fact that the provision of the Act under discussion contemplates a system of bookkeeping *prescribed by the Commission*, and *made up of items from data furnished the bookkeepers of the carriers* from time to time; and that it does *not* apply to the data itself.

And, on the other hand, it appears that the Commission has no jurisdiction to examine into the books of accounts, correspondence, etc., of corporations engaged in business which is related to but is not a part of interstate commerce.

In *Ellis vs. Interstate Commerce Commission*, 237 U. S., 434, the Commission, of its own motion, undertook to investigate "the practice governing the handling and icing of such (private) cars, and the minimum carload lots, etc.," and to that end summoned by subpoena, and attempted to force by a mandamus, the answering of questions put to officers of corporations owning or operating private cars. The question as to the right of the Commission to make such investigation or to compel the divulging of facts by the non-carrier corporations finally reached this Court, which, after a very full analysis of the situation, held, *inter alia*:

> "The Interstate Commerce Commission cannot enlarge its powers to compel testimony from a corporation which, not being subject to regulation by the Commission, is simply in the position of a witness interested in, but a stranger to, the inquiry, by making such corporation a party to the proceeding and serving it with notice." Syllabus "4."

And in *Harriman vs. Interstate Commerce Commission*, 211 U. S., 407, a case very similar to the preced

ing citation, it was held that the *primary* purpose of the Interstate Commerce Act is to *regulate* interstate business of carriers, and the *secondary* purpose, that for which the Commission was established, to *enforce* the regulations enacted by it.

From the context of the Act, and in the light of the foregoing decisions of this Court, we respectfully submit, therefore, that: (a) The accounts to be kept by the carrier, as provided by said Section 20, Paragraph 7, mean the system of bookkeeping that is prescribed by the Commission for its information on the business of the carrier; (b) That it does not apply to the data furnished for making entries in said system of bookkeeping by independent contractors and others performing work for or selling supplies to said carriers; and (c) That the data so furnished, and the books from which said data is taken, are not subject to the supervision of the Interstate Commerce Commission; and that where said data proves incorrect, punishment for furnishing the same must be found elsewhere than under the provisions of the Act to regulate Interstate Commerce.

4. And that an interstate carrier may enter into a contract with a non-carrier corporation for the facilitation of the carrier's business, so long as such contract is not forbidden by Federal Law, would seem to be sustained by a great weight of authority.

In *Cincinnati, N. O. & Texas Pacific Railway Company vs. Interstate Commerce Commission*, 162 U. S., 184, 197, this Court says:

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to

> persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

In the *Express Cases*, 117 U. S., 1, a number of Express Companies endeavored to override a contract between a particular Express Company and certain Railroad Companies, which gave to said Express Company a special privilege. This Court, in sustaining the contract giving the single Express Company a right over the various lines, held that Railroad Companies are not required by usage or by the common law to transport the traffic of independent Express Companies over their lines in the manner in which such traffic is usually carried and handled. And at page 24 of the opinion the Court said:

> "So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security."

In *Baltimore & Ohio Railroad Co. vs. Voigt*, 176 U. S., 498, a special contract between a Railroad Com-

pany and an Express Company was sustained. By the contract the Express Company employes were required to execute a release of all claims for injuries sustained by them in the course of employment. An employe was injured and sued the Railroad Company for damages. Held: That the contract and release were valid, and not contrary to law or public policy.

In *Chicago, St. Louis & N. O. R. R. Co. vs. Pullman Southern Co.*, 139 U. S., 79, a contract giving the Pullman Company an exclusive privilege to the use of its cars over the Railroad Company for a specified term was attacked as being in restraint of trade and against public policy. This Court sustained the contract, and at page 89 said, with relation to the contention that it was in restraint of trade:

> "The authorities cited in support of this contention have no application to such a contract as the one before us. The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing-room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing-room and sleeping cars, it was a matter of indifference to the public who owned them. Express Cases, 117 U. S., 1, 24, 25."

In *Donovan vs. Pennsylvania Company*, 199 U. S., 279, a contract granting a special privilege to the Parmelee Transfer Company to occupy the defendant's terminal premises, to the exclusion of others engaged in a like business, was sustained.

In *Robinson vs. Baltimore & Ohio R. R. Co.*, 237 U. S., 84, a contract between the Railroad Company and the Pullman Company, requiring the latter's employes to execute releases of all damages suffered in the course of transportation, was sustained as not contrary to any statute and in the face of the prohibition of the Employers' Liability Act of 1908, against contracts intended to exempt carriers from the liability imposed by that Act.

In *Berwind-White Coal Mining Co. vs. United States*, 9 F. (2d) 429, 439, the Circuit Court of Appeals (Third Circuit) demonstrates that Congress, the Commission and the Courts have recognized the right of independent companies to own private cars, and to have them transported under agreements with the interstate carriers; and that the Commission has no power over the private car owner.

And in *Ellis vs. Interstate Commerce Commission*, 237 U. S., 434, this Court recognizes the right in a carrier to enter into a contract with an independent corporation for the icing of refrigerator cars, and holds that such corporation cannot be regarded as a common carrier, subject to the Act to regulate Commerce. At page 443, the opinion says:

> "The Armour Car Lines is a New Jersey corporation that owns, manufactures, and maintains refrigerator, tank, and box cars, and that lets these cars to the railroad or to shippers. It also owns and operates icing stations on various lines

> of railway, and from these ices and re-ices the cars, when set by the railroads at the icing plant, by filling the bunkers from the top, after which the railroads remove the cars. The railroads pay a certain rate per ton, and charge the shipper according to tariffs on file with the Commission. Finally it furnishes cars for the shipment of perishable fruits, etc., and keeps them iced, the railroads paying for the same. It has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the Act."

If then, as seems clear under the foregoing authorities, it is within the power of the interstate carriers to make any contracts they may see fit—so long as they are not prohibited by law—for the facilitation of their business, it would seem to follow that no non-carrier corporation so engaged by contract can be brought within the terms of the Act to regulate Commerce without a clear provision therefor. And that no such provision appears in the Act under discussion, either expressly or by implication, seems so clear as to require no particular consideration.

5. It has been held that the section of the Act here under consideration is a highly penal one and should be applied only to those cases coming clearly within its provisions.

In *United States vs. Northern Pacific Railway Co.*, 242 U. S., 190, a suit was entered to recover the penalty prescribed by an amendment to Section 20 of the Act here under discussion. This Court, in construing the Act at page 194, said:

> "The statute is a penal one and should be applied only to cases coming plainly within its terms.

> Providence Steam Engine Co. vs. Hubbard, 101 U. S., 188, 25 L. ed. 786. While the reports filed must be truthful reports (Yates vs. Jones Nat. Bank, 206 U. S., 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638), yet, since they must be made under oath, the penalties for perjury would seem to be the direct and sufficient sanction relied upon by the lawmaking power to secure their correctness."

And again, at page 195:

> "The fact that the government sues for only one fifty-seventh part of the forfeitures which had accrued under the construction of the rule and statute contended for by it should make us slow to attribute to Congress a purpose to exact what is thus admitted to be a punishment greatly disproportionate to the offense. Statutes should be construed, as far as possible, so that those subject to their control may, by reference to their terms, ascertain the measure of their duty and obligation, rather than that such measure should be dependent upon the discretion of executive officers, to the end that ours may continue to be a government of written laws rather than one of official grace."

In the face, therefore, of all the foregoing authorities, and of the context of the Act itself, we earnestly submit and contend that there is not the semblance of a notice to the appellee that, in the performance under contract of one of the legitimate functions of its charter, it, a non-carrier corporation, rendered itself subject to the penal provisions of an Act which specifically relates to *common carriers engaged in interstate commerce*.

6. The indictment by its allegations imposes a duty on the Railroad to perform for the benfit of shippers,

in accordance with its tariffs, but does not allege that this duty was delegated to appellee. Upon the contrary the indictment is clear that appellee undertook as a contractor, and not as an employee, to do certain things "for and on behalf of said Railroad Company," and not for and on behalf of shippers. What the Railroad contracted for appellee to do, and what appellee undertook to do came strictly within the rights of each of them as has been shown.

Under the allegations of the indictment appellee neither assumed, nor was there delegated to it, any duty whatever to shippers. It made its reports to the Railroad. It did not act for the Railroad in dealing with shippers, nor was the responsibility of the Railroad to shippers lessened in any degree because of the contract with appellee. In the *Ellis Case*, *supra*, the Court said (444):

> "The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines itself."

Appellee concededly, and on authority, not being a common carrier, and not holding itself out to serve the public, *Munn v. Illinois*, 94 U. S. 113, cited by the Government (Gov. Br. 18) has no relevancy.

7. The contention of the Government as to the meaning of the word "kept" in the phrase "kept by a carrier" used in the statute, is inconsistent with the allegations of the indictment regarding the second class of offenses, Counts 51-65 inclusive, dealing with the "freight bills," for the indictment there uses the word "kept" in the sense of prepared, made or entered, as appellee contends it should be used.

The "freight bills" under the allegations were "kept" by the Railroad in the sense that the Railroad prepared them, but were not "kept" in the sense of being retained in the possession of the Railroad, for after being prepared they were "rendered" to the consignee.

The contention of the Government in this regard is further inconsistent with the statute, which forbids a carrier to "keep any other accounts, records or memoranda than those prescribed or approved by the Commission." The ice reports prepared by appellee and furnished to the Railroad are not alleged to have been "prescribed or approved by the Commission" and the Railroad, under the contention of the Government as to the meaning of the word "kept," would violate the statute by retaining said reports in its possession after receiving them. Such conclusion would, obviously, be absurd.

The context of the statute answers the contention of the Government as to the meaning of "kept" for in the proviso to Section 20 (7) the Commission is empowered to prescribe "the length of time such books, papers or documents shall be *preserved*," thus distinguishing the "preparing, making or entering" from the "retaining." The same distinction appears in the Appendix of the Government's Brief (37-38) wherein the Interstate Commerce Commission prescribes a "list of accounts, records and memoranda and periods of *retention*," and heads a column of its regulations: "Period to be *Retained*."

In *Fuller v. United States*, 58 Fed. 329, 333, construing a rule requiring that names be "entered in a book to be kept by the clerk," the Court, against the suggestion then urged and now urged by the Government, held that:

"When we say that the clerk shall 'keep' a record, or that a record shall be 'kept' by the clerk, we do not refer to the mere possession and control of the book in which the matters are recorded, but rather to the work itself of writing up the record."

The case of *Kennedy v. United States*, 275 Fed. 182, cited by the Government (Gov. Br. 19, 20, 21, 22) does not sustain the Government's contention. It is not susceptible of the interpretation urged by the Government that the record there involved was one "kept" by the Terminal Company. It was one "kept" by the Southern Railway. Kennedy was "a clerk in the Charleston Freight Office of the Southern Railway Company," and throughout its opinion the Court distinguishes the Southern Railway as "Railway Company" or as "Carrier," and Charleston Terminal Company as "Terminal Company."

Kennedy, as an employee of the Railway Company, was convicted under a certain count of the indictment of "willfully neglecting and failing to make full, true and correct entries of facts appertaining to the business in records kept by an interstate carrier," to wit, records "kept" by the Southern Railway.

His duty as clerk of the Southern Railway was to issue directions as to the disposition of cars. He kept a book in which was entered a complete record of each car and when a car went to the Terminal Company "he sent a manifest or memorandum."

The Court found (184):

"Kennedy's duty was to keep a true copy of this manifest in the Railway Company's office,"

and held (185):

> "The bill of lading and the record book in the defendant's office show that the shipments were order notify. The charge in the seventh count and the proof was that Car No. 28736 was consigned order notify, and was so entered on the way bill and in the car book *kept* by Kennedy. In the memorandum or manifest sent by Kennedy *officially* to the Terminal Company to indicate the car and whether it was free or order notify, and to control the Terminal Company in handling the car, he deliberately and intentionally omitted the words 'order notify.' This was beyond all dispute willful neglect and failure to make a full, true and correct *entry* of facts appertaining to the *carrier's* business of handling the shipment." (Italics ours.)

Thus it appears the Court held that Kennedy in neglecting to make correct entries in the manifest which he prepared or "kept" and which he later "officially"—that is as the clerk of the Railway Company—sent to the Terminal Company, was guilty of failure to make full, true and correct *entries* of facts "appertaining to the carrier's business of handling the shipment," meaning the Southern Railway's business. His offense was the failure to make correct "entries" in a record "kept" by him as clerk of the Southern Railway.

It is unnecessary to argue that if the Government's contention as to the sense in which the word "kept" is used in the statute is sustained the first 50 counts of the indictment would obviously fall, because under the allegations made the alleged "false entries" in the icing reports were made before said reports reached the Railroad and therefore, under the Gov-

ernment's contention, before they became records "kept by a carrier."

8. Appellee clearly cannot be guilty of the second class of offenses, Counts 51-65 inclusive, which relate to the "freight bills" alleged to have been prepared and rendered by the Railroad.

Criminal Code Section 332, cited by the Government, has no application here, for the Railroad which "kept" or prepared the "freight bills" is not alleged to have "willfully" made any false entries therein, and, therefore, no crime under the statute is alleged of which the appellee could be guilty either as a principal or as an abettor.

Appellee not coming within the class of persons under the statute who could make entries in the "freight bills," and under the allegations of the indictment not having made any entries therein, could not be a principal in the willful making of false entries therein, and there being no principal shown, the Railroad being "innocent," and no collusion between the Railroad and appellee alleged, appellee could not be an abettor in the alleged offense. *United States v. Pyle*, 279 Fed. 290; *Coffin v. United States*, 162 U. S. 664, 667.

9. At the beginning of this brief we called the Court's attention to certain salient facts, namely:

(a). That The Pennsylvania Railroad Company, interstate carrier, is *not* indicted;

(b). That the Government admits that said interstate carrier was free from any blame by averring that the reports complained of were received by said carrier as "true and correct" and by the statement in its brief that the Railroad was "innocent," and

(c). That the appellee is admittedly *not* an employe of the carrier, but was engaged in its own legitimate

business under a written contract, wherein it undertook to perform certain work "for" said carrier.

If, therefore, as appears from the averments of the indictment, the common carrier is free from any criminal connection with the alleged false entries, we submit that the only way by which the appellee can be held to be criminally liable is by demonstrating it to be a *principal under the law cited in the syllabus of the indictment*. And this can only be accomplished by showing that the appellee comes within the terms of the Act as "a person acting for or employed by such corporation (carrier)" (Section 10 (1), ante, page 6).

But we submit that appellee cannot be construed to be "an employe" within the terms of the Act because (a) under the averred facts it is not so named, but, on the contrary, is consistently throughout said averments referred to as "acting under contract;" and (b) the facts show that it is not one of the class of corporate officers or employes designated therein.

Nor can the words "or person acting for or employed by such corporation" be construed to include the appellee.

It is an elementary rule of construction that where specific words in a statute are followed by general words, the latter will be restricted in their meaning to things or matters of the same kind as those first mentioned.

> 13 *Corpus Juris*, Section 501, page 537;
> *Hickman vs. Cabot*, 183 Federal Rep., 748 (C. C. A., Fourth Circuit).

And in Section 10 (1) the clause preceding the general words above quoted restricts those included in

the statute to "any director or officer thereof, or any receiver, trustee, lessee, or agent, or person acting for or employed by such corporation, etc.," (See *ante*, page 6). That is to say, the persons included must be directly connected with the business of the carrier, and subject to its supervision. Consequently, we contend that the appellee does not come either within the provisions of the Act to regulate Commerce here involved as a principal or an abettor, because, as we have hereinabove endeavored to show, it could not be a principal under said provisions of the Act, as it is not subject to such provisions; and it cannot be guilty of abetting without some collusive relationship with one subject to the provisions of the Act.

SUMMARY.

10. In conclusion, and by way of summarization, we, therefore, earnestly contend that under the provisions of the Act to regulate Commerce, and, as well, the various authorities hereinabove cited, this indictment cannot be sustained for the following reasons:

(a). Because the records that are subject to the provisions of the Act are only those which are entered in the books of accounts kept by the carrier in accordance with the prescribed rules of the Commission—the "keeping" of all other records being specifically prohibited by law;

(b). Because the ice reports of appellee referred to in the indictment are manifestly records of a non-carrier, over which the Commission has no jurisdiction;

(c). Because the appellee, in performing the work for the carrier, was acting as an independent contractor, and not as an employe of the carrier;

(d). Because, in making said contract, both the carrier and appellee were acting within their rights, in that the Act does not prohibit said contract, and contracts of like kind have been repeatedly recognized by the Courts;

(e). Because, if the data furnished by the appellee is part of the records covered by the Act under discussion, then every contractor who constructs a steel or concrete bridge that carries a railroad over a ravine or river, and every person or corporation furnishing supplies or work of any kind, and every person filing a telegram with a Telegraph Company for transmission (Gov. Br. 11) is subject to indictment under the provisions of said Act, without notice of such criminal liability in the phraseology of said Act, or under any decision of this Court construing the same; and

(f). Because, if our reasoning be sound that the appellee is not subject to the provisions of the Act under consideration, Section 332 of the Criminal Code can have no application.

CONCLUSION.

The judgment of the District Court, quashing the indictment should be sustained.

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